



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE April 14, 2011

TO Members, Sixty-First Legislature of the State of Wyoming.

FROM Matt Obrecht, Staff Attorney

SUBJECT Principles of State Legislative Redistricting Law

Introduction

There are basic legal principles of redistricting state legislative districts which help guide a legislature to craft a redistricting plan that is constitutional and which will survive a court challenge. This memorandum will provide a discussion of these guiding principles and their judicial development, as well as a brief history of challenges to past Wyoming redistricting plans. Hopefully this memorandum will be a helpful guide to legislators as the Joint Corporations, Elections and Political Subdivision Interim Committee begins the process of developing plans for redistricting Wyoming State House and Senate districts based on the 2010 United States Census.

Discussion – Redistricting Principles

On April 12, 2011, the Joint Corporations, Elections and Political Subdivision Interim Committee, which is tasked with sponsoring a redistricting bill for introduction during the 2012 session, adopted a list of "Redistricting Principles". Any plan developed by the Committee was required to adhere to the Redistricting Principles. The Redistricting Principles adopted by the Committee were:

1. Election districts should be contiguous, compact, and reflect a community of interest;
2. Population of election districts should be substantially equal, with the range of deviation not to exceed 10%;
3. To the greatest extent possible, in establishing election districts:
 - a. County boundaries should be followed;
 - b. The majority of the population of each county should be in one district;
 - c. Census blocks should be followed.

4. The plan should avoid diluting voting power of minorities in violation of the Voting Rights Act;
5. The House shall have 60 seats and the Senate shall have 30 seats;
6. Consideration should be given to two (2) contiguous House districts in each Senate district; and
7. Significant geographical features should be considered in establishing districts.

This memorandum will discuss each of the Redistricting Principles to give all members of the Legislature, a background understanding of why these principles are necessary to ensure that the 2012 redistricting plan will meet or exceed all constitutional requirements.

One Person – One Vote

"One person, one vote" is the overarching guiding principle and ultimate goal of all redistricting efforts. This phrase encompasses the notion that the full protections of the United States Constitution are imposed on State actions effecting voting in general, and legislative redistricting in particular, through the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹ The concept of "one person, one vote" has been described by the United States Supreme Court as meaning that "as nearly as is practicable one man's vote in a ...election is...worth as much as another's."² In furtherance of this principle, the United States Supreme Court has held that when drawing legislative boundaries "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."³

To ensure population equality among state legislative districts, the United States Supreme Court eventually settled on a formula that a legislative districting plan with a maximum population deviation of 10% or less of the ideal district population (that is if the largest legislative district contains a population 10% larger or less than the population of the smallest legislative district) does not establish a prima facie violation of the Equal Protection

¹ The Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

² *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

³ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

Clause.⁴ The effect of this ruling is that if a state advances a plan with less than a 10% total deviation, there is no burden on the state to justify the population deviation.⁵ While adopting a redistricting plan with a total deviation of less than 10% does not guarantee that a Court will find the plan constitutional, it is the most sure approach that states have employed to prevent and then defeat challenges to their redistricting schemes.

Redistricting in Wyoming – From Statehood to Present

The decisions of the United States Supreme Court requiring substantial population equity among all state legislative districts have directly clashed with provisions of the Wyoming Constitution, Article 3, Section 3 which provides:

Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate. The senate and house of representatives first elected in pursuance of this constitution shall consist of sixteen and thirty-three members respectively. (emphasis added).

All of Wyoming's redistricting plans from statehood incorporated the requirement that each county constitute at least one senate and house district.⁶ However, things began to change with the redistricting cycle following the 1960 census. The Federal District Court for the District of Wyoming held that the 1963 Wyoming redistricting plan, which provided that each county was its own senate district, was a violation of the 14th Amendment to the United States Constitution.⁷ The *Schaefer* court stated that strict compliance with Art. 3, § 3 of the Constitution "would be wholly unreasonable, untenable and impractical."⁸ The court then went on to hold that "the Wyoming Reapportionment Act of 1963... insofar as it provides for representation in the state senate, constitutes an invidious discrimination, and violates the equal protection clause of the Fourteenth Amendment to the Constitution."⁹

⁴ *Gaffney v. Cummings*, 412 U.S. 735, 751-52 (1973).

⁵ *Gorin v. Karpan*, 788 F. Supp. 1199, 1201 (D. Wyo. 1992).

⁶ Various Wyoming Redistricting Plans have also incorporated multi-member districts which will be further addressed in this memorandum.

⁷ *Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964)

⁸ *Id.* at 252

⁹ *Schaefer*, 240 F.Supp at 252.

The *Schaefer* decision, however, did not alter the manner in which representatives to the Wyoming House were apportioned. Redistricting plans subsequent to *Schaefer* still provided that each county was required to be, at least, its own house district. In fact, the 1981 redistricting plan, which provided that every county shall constitute at least one house district, survived a direct challenge to the United States Supreme Court.¹⁰ However, everything changed following the decision in *Gorin v. Karpan*, 775 F.Supp, 1430 (D. Wyo. 1991). *Gorin* is currently the leading case on redistricting law in Wyoming. In *Gorin*, the United States District Court for the District of Wyoming held that Wyoming's 1991 Legislative Reapportionment Act was an unconstitutional violation of the Equal Protection Clause because the 1991 Act had a population deviation of 83% in the House of Representatives which served no rational state policy. The 1991 Legislative Reapportionment Act allocated one representative to each county regardless of county population, with the remaining 15 seats allocated among the most populous counties. The *Gorin* court held that the Legislature must disregard Art. 3, Section 3 when reapportioning house seats because of its inherent conflict with the one person, one vote principle. The court set a deadline for the legislature to develop a plan which conformed to the requirements of the United States Constitution and also explicitly warned the legislature that if it failed to come up with a plan which satisfied these constitutional requirements by the deadline, the court itself would reapportion the state legislative districts.¹¹

Legislative Response

In response to the District Court's decision in *Gorin*, the Wyoming Legislature enacted a new redistricting plan in 1992.¹² The 1992 Act was a "nested" plan – two house districts were placed wholly inside of the boundaries of one senate district. The house and senate boundaries did not adhere strictly to county boundaries. The 1992 Act had a range of population deviation of less than 10% among districts in each chamber of the legislature. The Federal District Court for the District of Wyoming concluded that the 1992 act met the constitutionally required mandate of substantial equality of population among legislative districts.¹³

The 2002 Redistricting Act¹⁴ followed the basic structure and guidelines of the 1992 Act and used nested house and senate districts with a population deviation of less than 10%. The 2002 redistricting plan was not challenged in court.

Minority Voters and Communities of Interest

¹⁰ *Brown v. Thomson*, 462 U.S. 835 (U.S. 1983).

¹¹ *Id.* at 1466.

¹² See 1992 Session Law Chapter 1, § 7.

¹³ *Gorin v. Karpan*, 788 F. Supp. 1199 (D. Wyo. 1992).

¹⁴ See Wyoming Session Laws 2002 Sp. Sess. ch.1, §1.

The Voting Rights Act of 1965 had broad reaching effects on the manner in which states conducted the redistricting process. Under the Voting Rights Act, many states are required to receive pre-approval of their redistricting plans from the Department of Justice to ensure that the plans give minority groups representation in Congress and state legislatures that is commensurate with a minority group's population in a given geographical area. Wyoming is not a state that is required to receive Department of Justice pre-approval before implementation of its redistricting plan.

However, in past redistricting cycles, the Wyoming Legislature has recognized that the Native American population residing within the Wind River Reservation in Fremont County constitutes a geographically distinct minority group with a sufficient population to warrant the creation of a Native American majority house district. In developing the 2002 Redistricting Plan, the Joint Corporations, Elections and Political Subdivision Interim Committee actively sought the input of the Eastern Shoshone and Northern Arapahoe Tribes to ensure that Native Americans were fairly represented in the redistricting plan.

Additionally in the 2001-02 interim, the Wyoming Legislature reached out to Hispanic groups throughout the state to make certain that these groups were fully advised of the Committee's redistricting activities and were given an opportunity to comment and provide input on redistricting plans.

Unlike numerous other states' redistricting plans, including those of some neighboring states, a Wyoming redistricting plan has never been challenged in court for illegally under representing minority groups.

"Community of interest" has a meaning which includes distinct racial, ethnic and minority groups, but also encompasses such concepts as "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches" and even the characteristic of certain neighborhoods.¹⁵ At least one court has stated that "community of interest" is an imprecise term and is difficult to apply.¹⁶ In Wyoming, communities of interest may arise around a shared water source, impact from energy development, recreational issues, or other issues which directly affect a limited portion of the population in a geographically distinct area. While it is not possible, and certainly not practicable, to attempt to ensure that all communities of interest are in the same legislative district, the Joint Corporations, Elections and Political Subdivision Interim Committee considered it an essential concept to bear in mind when developing redistricting plans.

Multi-Member Districts

¹⁵ *Bush v. Vera*, 517 U.S. 952, 964 (U.S. 1996)

¹⁶ *Polish Am. Cong. v. City of Chi.*, 226 F. Supp. 2d 930, 936 (N.D. Ill. 2002).

Until the 1992 Redistricting Act, Wyoming legislative apportionment plans incorporated multi-member legislative districts, or districts in which more than one senator or representative was elected to represent the entire district.¹⁷ As stated previously, the 1992 Redistricting Act incorporated nested senate and house districts in which one senator and one representative were elected to represent each senate or house district, respectively.

The shift away from multi-member districts was not directly necessitated by a court decision. The courts have held that multi-member legislative districts are not *per se*, or automatically, unconstitutional, but some courts have found such districts present inherent weaknesses which are difficult to square with the constitutional requirement of "one person, one vote". The United States Federal District Court for the District of Wyoming has noted possible constitutional infirmities of multi-member districts, which include:

1. Voter confusion more likely;
2. Legislators may be more remote or distant from their constituents;
3. Electoral minorities¹⁸ tend to be submerged while the electoral majority is overrepresented;
4. Candidates running for office in districts electing more than four (4) representatives face significantly greater campaign costs and are less likely to defeat incumbent candidates; and
5. Voter participation is historically lower in most multi-member districts.¹⁹

While choosing to incorporate multi-member districts in Wyoming's 2012 redistricting plan is not constitutionally prohibited, such a plan would need to be carefully drawn. It should also be noted that if Wyoming was to return to multi-member districts, it would break with national precedent in a number of ways. First, a state which has adopted statewide single member districts has never opted to return to multi-member districts or create multi-member districts for the first time. Second, there has been a broad trend among states away from multi-member

¹⁷ See *The 1992 Reapportionment Law: The Demise of the Multi-Member District System and its Effect Upon the Representation of Women in the Wyoming Legislature* 34 Land & Water L. Rev. 407 (1999).

¹⁸ In this context, an electoral minority, while possibly encompassing racial, ethnic or religious minorities, refers more directly to minority political parties within the legislative district. *Gorin v. Karpan*, 775 F.Supp. 1430, (D.Wyo. 1991).

¹⁹ *Id.* at 1447, n.23.

districts.²⁰ It may also be that a return to multi-member districts could increase the likelihood that the redistricting plan would be challenged as violating "one person, one vote".

Political Gerrymandering

"Political gerrymandering" is the term used to describe a redistricting plan which does not follow traditional or accepted principles of redistricting, but which is intended to maximize the advantage of a certain group or party. The name for the term comes from then Massachusetts governor Elbridge Gerry who authorized a redistricting plan in 1812 with districts which were not contiguous or compact, but which reminded one commentator of resembling the shape of a salamander, hence the term "gerrymandering".²¹

There is uncertainty whether political gerrymandering claims can be effectively adjudicated in courts, given the traditional hesitancy of courts to wade into what may be deemed a purely "political question".²² However, in 1986 the United States Supreme Court opened the door to claims that political gerrymandering is unconstitutional asserting that the claim was justiciable and that a court could develop standards to determine when a redistricting plan constitutes political gerrymandering. The United States Supreme Court waded into this fray in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) with less than clear results. In that case, the Court rejected appellants' challenge to the plan on the basis of political gerrymandering, and did not reach agreement as to whether a reliable test for political gerrymander might exist.

Given the current posture of the courts on political gerrymandering in redistricting, the National Conference of State Legislatures has advised that,

If a redistricting plan is so discriminatory that the state cannot articulate any legitimate governmental interest in drawing it, the plan may be rejected by a lower court and provide an occasion for the Supreme Court to articulate the necessary standard for determining its constitutionality. For now, redistricting plans are being examined on a case-by-case basis, with a strong focus on the circumstances surrounding their design and adoption, to determine whether the alleged partisan gerrymander goes beyond constitutional limits.²³

Articulating a legitimate governmental interest for drawing a redistricting plan is a relatively low hurdle to clear if a redistricting plan is challenged in court. The 2002 Wyoming Redistricting

²⁰ As of 2009, 13 states still had multi-member districts in at least one legislative body. (See NCSL – *Redistricting Law 2010*, pp. 136-37 and accompanying table).

²¹ See *Vieth v. Jubelirer*, 541 U.S. 267, 274 (U.S. 2004).

²² *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1111 (10th Cir. 2006).

²³ *Redistricting Law 2010*, p. 115, National Conference of State Legislatures (2010).

Principles took a very proactive approach to dispel even the appearance of political gerrymandering by adopting a principle that consideration of residence of current legislators (who would obviously constitute a majority of the political party in control of the legislature) should be avoided.²⁴

Contiguous, Compact, Geographic Features, and Census Blocks

Ensuring that legislative districts are both contiguous and compact has been identified by the United States Supreme Court as traditional principles of redistricting.²⁵ Contiguity requires that all parts of a district be connected at some point with the rest of the district. The term "compactness" has historically been used to relate to the minimum distance between all parts of the constituency. However, given the enormous disparities in legislative districts across the nation (a city block in New York with over 3000 residents compared to an entire county in Wyoming without that many residents) there are no hard and fast rules as to when a district is compact.

In measuring compactness, at least 3 separate tests have been employed by the courts.²⁶ The United States Supreme Court stated that it uses an "eyeball approach" to evaluate compactness.²⁷ A state does not need to show that it drew the most compact district possible, but is required to have compactness as one of its primary goals. Compactness has been described not as a reference to geographical shape,

but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city.²⁸

Thus, in the context of redistricting Wyoming legislative districts, the constitutional requirement of "compactness" is akin to the other requirements of leaving community of interests intact and following political subdivision boundaries and geographical features.²⁹

²⁴ It is interesting to note, that according to the United States Supreme Court, *protection* of incumbents when drawing a redistricting plan is actually a traditional redistricting principle. *Abrams v. Johnson*, 521 U.S. 74 (1997).

²⁵ *Shaw v. Reno*, 509 U.S. 630, 642 (U.S. 1993).

²⁶ Those tests are: 1) The total perimeter test; 2) The Reock test; and 3) The Schwartzberg test. See *Stone v. Hechler*, 782 F. Supp. 1116, 1127 (N.D. W.Va 1992).

²⁷ *Bush v. Vera*, 517 U.S. 952, 960 (1996).

²⁸ *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994).

²⁹ It should be noted that the term "compactness" has different meanings in the context of the legal claim being asserted. In racial gerrymandering cases for instance, "compactness" is used as a threshold test to determine a prima

A "census block" is a geographic area bounded on all sides by visible or nonvisible features shown on census maps. A census block is the smallest geographic entity for which the Census Bureau collects and tabulates decennial census information. States have input into the boundaries of census blocks through the first phase of the Redistricting Data Program, when the county clerks and Census Bureau work together to draw accurate lines. County clerks utilize census blocks when establishing precinct boundary lines. Following census blocks helps ensure that legislative districts follow boundary lines of other election districts, such as county and municipal elected officials, school board and special districts. While following census block boundaries certainly helps county clerks and other election officials as they prepare for an election, the full benefit is realized on election day with a reduction in different ballots required at a polling station, less voter confusion, and a decreased likelihood that election irregularities will occur.

Conclusion

While certainly not an exhaustive remedy for all potential issues that may arise during the redistricting process, adherence to the Redistricting Principles will help ensure that a redistricting plan introduced in the 2012 Budget Session will conform to the principles of "one person, one vote" and is likely to withstand a legal challenge.

cc: Dan Pauli, Director

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facie case of racial discrimination under the 14th Amendment. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

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